FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 7 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 446

EARL GUY,

Petitioner,

vs.

L. F. UTECHT, Warden of State Prison, Stillwater, Minnesota,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA, BRIEF IN SUPPORT THEREOF, AND APPENDIX CONTAINING MOTION TO DISPENSE WITH PRINTING OF RECORD FOR USE ON CERTIORARI PROCEEDINGS.

HARRY O. ROSENBERG,
77 W. Washington Street,
Chicago, Illinois,
Attorney for Petitioner,

DAVID R. LANDAU,
Chicago, Illinois,

ARTHUR LeSUEUR,
Minneapolis, Minn,
Of Counsel.

Midwest Law Printing Co., DElaware 7-6669

INDEX.

PAGE

Petition for a Writ of Certiorari:

Summary Statement of the Matter Involved 2

Reasons Relied On for the Allowance of the Writ 9

Prayer for Writ 9

Brief In Support of Petition for Writ of Certiorari:

I. Opinions Below 11

II. Jurisdiction 12

III. Statement of the Case 12

IV. Specification of Assigned Errors to Be Urged 12

Argument 13

Conclusion 20

INDEX TO APPENDIX.

Motion to Dispense With Printing of Record 21

Affidavit in Support of Motion 23

TABLE OF CASES CITED.

Guy v. Utecht, 216 Minn. 255, 12 N. W. 753 11

Guy v. Utecht, 54 Fed. Supp. 287 ..... 7, 8, 11

Guy v. Utecht, 144 Fed. (2d) 913 ..... 7, 8, 12

Guy v. Utecht, ... Minn. ...., 38 N. W. 2d 59 8

Guy v. Utecht, 215 Minn. 255 8

Hawk v. Olson, 326 U. S. 271 18

In re Snell, 31 Minn. 110, 16 N. W. 692 18

Lee v. Murphy, 12 Am. Rep 563 13

Salinger v. Loisel, 265 U. S. 224, 68 L. Ed. 989, 44 S. Ct. 519 18

State ex rel. DuFault v. Utecht, 220 Minn. 431, 19 N. W. 2d 706, 161 A. L. R. 1316 19

State ex rel. Lambke v. Bechdel, 37 Minn. 360, 31 N. W. 334 18

U. S. ex rel. Bruno v. Reimer, 103 Fed. (2d) 341 18

Waley v. Johnston, 216 U. S. 101 18

TABLE OF STATUTES CITED.

Title 28, U.S.C., Section 1257 (3) 12

Minnesota Statutes 1941, Sec. 638.07 16

Minnesota Statutes 1941, Sec. 589.29 19

Minnesota Statutes, Section 589.30 19

Minnesota Statutes, 1941, Sec. 638.02 13

Minnesota Statutes 1941, Sec. 638.07 14

610.41 Restoration to Civil Rights 15

610.42 Certification by Proper Officers 15

20 R. C. L. 5304 13

30 Am. Jur., p. 908, et seq., § 161 et seq. 18

45 Am. Juris., Records and Recording Laws § 2, page 420 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No.

EARL GUY,

Petitioner,

vs.

L. F. UTECHT, Warden of State Prison, Stillwater, Minnesota,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Earl Guy, prays for a Writ of Certiorari to the Supreme Court of Minnesota to review a judgment of that court decided June 10, 1949 and entered on June 21, 1949, affirming a judgment and/or order of the District Court of Washington County of said state, entered on February 8, 1949 which denied his petition for a Writ of Habeas Corpus and discharged an order to

show cause why a Writ of Habeas Corpus should not issue, which said order was entered on February 1, 1949.

Summary Statement of Matter Involved.

On December 12, 1929, the petitioner was convicted of the crime of bank robbery in the District Court of Wright County, Minnesota, and was sentenced to imprisonment in the State Prison of Stillwater, Minnesota for the period of life. He was confined therein from said date to December 14, 1936.

On December 14, 1936, on an application theretofore made to the Board of Pardons with a claim therein that the said Earl Guy was not guilty of the offense for which he was convicted on December 12, 1929, the Board of Pardons duly and legally commuted said sentence "to expire forthwith."

On November 12, 1937, L. F. Utecht, the then acting Warden of the Minnesota State Prison at Stillwater, certified to the then Governor of the State of Minnesota, Elmer A. Benson, "that the said Earl Guy was on the 22nd day of December, 1936 released from further imprisonment in the said Minnesota State Prison for the reason that the Board of Pardons on December 14, 1936 commuted said sentence to expire forthwith."

On November 15, 1937, the then Governor of the State of Minnesota, Elmer A. Benson, duly and legally restored to said petitioner, Earl Guy, all rights of citizenship which were forfeited by his conviction and sentence.

Pursuant to the aforementioned act of the Board of Pardons the petitioner, Earl Guy, was officially notified that his sentence was commuted to expire forthwith.

On February 16, 1940, the Board of Pardons of the State of Minnesota assumed to annul said termination of the petitioner's sentence of date December 14, 1936 and ordered the reincarceration of said petitioner.

On December 22, 1942 your petitioner applied for a Writ of Habeas Corpus to the District Court of Washington County, Minnesota; the writ was issued and a hearing had thereon.

The Petition for the Writ of Habeas Corpus set forth:

(1) as Exhibit "A"—a certified copy of the commutation of sentence, attested to by the Clerk of the Board of Pardons, and obtained from the office of the Board of Pardons, stating that the sentence of the petitioner was to "expire forthwith" (pages 7 to 9 of Exhibit "F", constituting an "original exhibit" of the record and transcript of testimony in the Supreme Court of Minnesota #33642 (1942), having been introduced in the trial of this cause in the lower courts).

(2) as Exhibit "B"—a certified copy of a document restoring the petitioner to all rights of citizenship which were forfeited by his conviction and sentence (Exhibit "F" pages 9 and 10).

(3) as Exhibit "C"—a certified copy of a document signed by the Board of Pardons, annulling the commutation of the petitioner (Exhibit "F" pages 10 and 11).

The Petition further alleged that no proof was offered that the petitioner had failed to abide by the conditions specified in Exhibit "A" (Exhibit "F" page 9).

The Return to the Writ of Habeas Corpus stated that the petitioner was granted a "conditional pardon," and

admitted the correctness of Exhibit "A" containing the termination of sentence, as attached to the petition. The respondent maintained that the petitioner was set at liberty upon the condition that he keep steadily employed and lead a law-abiding life; that he had been indicted for a crime; that the indictment has never been tried nor disposed of; that, as shown by the petition herein, the petitioner was restored by the Governor to his civil rights; and that the "conditional pardon" was annulled and revoked without notice to the petitioner. (Exhibit "F", pages 12 to 16).

The Judge of the District Court of Washington County, before whom this matter was heard, held that the imprisonment was unlawful and ordered the discharge of the prisoner, but a stay of twelve days was allowed (Exhibit "F" page 27). In the memorandum filed therewith the judge said: "The commutation in question did not reserve any power or authority in the board to revoke the commutation. In view of the foregoing we must hold that petitioner is now being illegally detained * * *". (Exhibit "F" page 30). During the twelve day stay the respondent made an amended return to the writ, setting forth as Exhibit "B" to the Return, a copy of the Commutation on file in the *Governor's* office, containing in addition to the matter appearing in petitioner's Exhibit "A" the following paragraph, imprinted thereupon by a rubber stamp:

> "This commutation is granted and accepted upon the express understanding that this Board reserves the right to determine whether any condition hereof has been violated and, if violation can be found, to revoke this commutation and to cause the said prisoner to be returned to his institution to serve the remainder of his sentence."

And at the bottom:

"Accepted
(signed) Earl Guy"
(Exhibit "F" pages 49 to 51)

The amended return further alleged that the conditions had been violated, with proof of said violations consisting of an *indictment* for the crime of burglary, and the charge of assaulting an officer. On said amended return further hearing was had, and the order discharging the prisoner was revoked by the trial court and the prisoner remanded. Whereupon an appeal was taken to the Supreme Court of Minnesota, and a trial *de novo* was had, pursuant to the state statute.

At said trial *de novo* Respondent's Exhibit I was the the same as Exhibit "B" attached to the Amended Return to the Writ of Habeas Corpus (Exhibit "F" page 241). It was shown that the reservation of authority to revoke the commutation (the clause quoted above) was added by a *rubber stamp* to the printed form of the document filed in the Governor's office, it being in question as to when the "rubber stamp" paragraph was added. The Secretary of the Board of Pardons testified that this document was not signed on December 14, 1936, when purportedly issued but a week later; that he prepared it pursuant to notes taken at the meeting of the Board of Pardons; then the attestation was signed; and then he copied it into the book record. But he admitted that he did not place the "rubber stamp" clause on the book record or book copy. He further testified that he mailed the document to the Warden, and that it was returned with "Accepted—Earl Guy" added, together with the Warden's certificate on the back. (Exhibit "F" pages 94-102). The petitioner, in his reply to the Amended Return, relied on Exhibit "A" attached to the original

petition for the writ, as being the true and correct copy of such record of commutation. (Exhibit "F" page 301). However, testimony indicated that several "copies" were made having neither the "rubber stamp" paragraph nor the acceptance.

The respondent introduced testimony attempting to show that the petitioner did not live a law-abiding life, and that he had been indicted for a felony; but nowhere was it shown that the petitioner was *convicted* of any crime by any Court since his original sentence was commuted. (Exhibit "F" pages 225 to 229).

The Respondent testified (Exhibit "F" pages 225 to 229) that he, as the then acting Warden, certified to the Governor as part of his regular practice concerning cases coming from the Board of Pardons the document described as Exhibit 2 in Supreme Court (Exhibit "F" pages 241-242) and discussed at pages 62-63 in Exhibit "F".

It was conceded by respondent in his Brief in the Supreme Court of Minnesota file #33642, at page 11:

> "The Governor's certificate of restoration of civil rights was issued on the strength of a certificate filed with the Governor by the warden. See Respondent's Exhibit 2, page 241. The recital in the Governor's certificate of restoration that the Board of Parole had finally discharged the prisoner was erroneous. (Apparently the Governor's office used the wrong blank form)."

On December 24, 1943 the Supreme Court of Minnesota affirmed the decision of the District Court of Washington County *Guy* v. *Utecht*, 216 Minn. 255, 12 N.W. 753.

The petitioner then applied to the Federal District Court for relief, but same was denied because the petitioner had not exhausted his state remedies by seeking an appeal or Writ of Certiorari from the United States Supreme Court *Guy* v. *Utecht,* 54 Fed. Supp. 287; appeal was taken to the United States Circuit Court of Appeals with the same result, *Guy* v. *Utecht,* 144 Fed. (2d) 913.

On February 1, 1949 your petitioner, pursuant to filing his second petition for Writ of Habeas Corpus in the District Court of Washington County, Minnesota, succeeded in obtaining an order to show cause why a Writ of Habeas Corpus should not issue, and hearing was had thereon. At this hearing petitioner set forth:

(1) as Exhibit "A"—a copy of the *minutes* of the Board of Pardons, stating that the sentence of Earl Guy was to "expire forthwith," and having no references to any conditions. (R. 11).

(2) as Exhibit "B"—a copy of the *certification* made by the respondent, certifying to the Governor that the sentence of Earl Guy was commuted to "expire forthwith." (R. 14).

(3) as Exhibit "C"—a certified copy of a document signed by the Governor, restoring the petitioner to all rights of citizenship which were forfeited by his conviction and sentence. (R. 15).

(4) as Exhibit "D"—the notification to the petitioner that his sentence was commuted to "expire forthwith." (R. 16).

(5) as Exhibit "E"—a copy of a document signed by the Board of Pardons, annulling and revoking the commutation of the petitioner. (R. 17).

In addition thereto the petitioner introduced into evidence the testimony of an employee of the Board of Pardons,

the last two respective items being offered as newly discovered evidence.

The employee of the Board of Pardons, one Louise Jefferson by name, testified that the "Rubber Stamp" paragraph was not affixed to the minutes, the copy book, nor the certificate of commutation on file in the office of the Secretary of the Board of Pardons; that the "rubber stamp" paragraph on the copy on file in the Governor's office was put on at the prison (R. 48-51). She further testified that the signatures of the members of the Board of Pardons in the instant case did not appear on the record book as the Secretary of the Board "would copy their names."

The evidence of the minute record and copy book was not presented to either the trial court or to the Supreme Court upon the hearing of the first petition; nor was the validity of the restoration of civil rights and its consequence adjudicated (Exhibit "F" page 67). Further, the questions of a collateral attack on the records were not raised upon the initial proceeding on the first petition.

On February 8, 1949, the District Court of Washington County denied the petition for a Writ of Habeas Corpus and discharged the order to show cause why a Writ of Habeas Corpus should not issue. Appeal was then taken to the Supreme Court of Minnesota, and upon stipulation the issues therein considered were to be the same as presented to the Court below. This also included the transcript of record in *Guy* v. *Utecht*, 215 Minn. 255, which was introduced as an exhibit in the trial Court (Exhibit "F") and incorporated by reference.

On June 10, 1949, the Supreme Court of Minnesota affirmed the decision of the District Court of Washington County, Minnesota: *Guy* v. *Utecht*, ... Minn. ...., 38 N. W. 2d 59.

Reasons Relied on for Allowance of the Writ.

I. The court below erred in holding that the Board of Pardons had jurisdiction to revoke the termination of sentence; it erroneously construed an absolute commutation as conditional.

II. The court below erred in holding that the petitioner collaterally attacked the "original record" of commutation; it erred in construing a copy of the commutation as the "original record."

III. The court below erred in affirming the denial of the Writ of Habeas Corpus as being within the doctrine of *res judicata.*

IV. The court below erred in depriving the petitioner of his civil rights and of his liberty without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

V. The court below erred in upholding deprivation of the petitioner's rights, privileges and immunities as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The decision sought to be reviewed, if permitted to stand uncorrected, will result in a denial to the petitioner of his fundamental constitutional rights according to the rules laid down heretofore by this Honorable Court.

Wherefore, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of Minnesota, commanding that Court to certify and send to this Court for its review a full and complete transcript of the record of all proceedings of said Court in this cause, to the end

that this cause may be reviewed and determined by this Court; that the judgment of the Supreme Court of Minnesota be reviewed and the petitioner be granted such other and further relief or remedy in the premises as to this Court may seem just and proper.

HARRY O. ROSENBERG,
Attorney for Petitioner.

DAVID R. LANDAU,
ARTHUR LESUEUR,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No.

EARL GUY,

Petitioner,

vs.

L. F. UTECHT, Warden of State Prison, Stillwater, Minnesota,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

Opinions rendered prior to this proceeding are reported as follows: *Guy* v. *Utecht,* 216 Minn. 255, 12 N.W. (2d) 753, affirming the lower court's dismissal of the Writ of Habeas Corpus; the petitioner then applied to the Federal District Court for relief, but same was denied because the petitioner had not exhausted his state remedies by seeking an appeal or Writ of Certiorari from the United States Supreme Court *Guy* v. *Utecht,* 54 Fed. Supp. 287; appeal was taken to the United States Circuit

Court of Appeals with the same result. *Guy* v. *Utecht*, 144 Fed. (2d) 913.

Guy v. *Utecht*, ... Minn....., 38 N.W. 2d 59, affirming the decision of the District Court of Washington County, Minnesota, in dismissing the second petition for Writ of Habeas Corpus.

Jurisdiction.

The judgment of the Supreme Court of Minnesota now sought to be reviewed was decided June 10, 1949 and entered on June 21, 1949; upon consideration of the applications of counsel for petitioner, this Court extended the time for filing this petition for the Writ of Certiorari up to and including November 7, 1949. The jurisdiction of this Court is conferred by Title 28, U.S.C., Section 1257 (3).

Statement of the Case.

A summary statement of the case is set forth in the petition.

Specification of Assigned Errors to Be Argued.

The assigned errors to be argued are identical with the "reasons relied on for the allowance of the writ" set forth in the foregoing petition.

ARGUMENT.

I.

The Court below erred in holding that the Board of Pardons had jurisdiction to revoke the termination of sentence; it erroneously construed an absolute commutation as conditional.

As held in *Lee* v. *Murphy*, 12 Am. Rep. 563; 20 R.C.L. 5304, "A commutation is the substitution of a lesser for a greater punishment by authority of law and may be imposed upon the convict without his acceptance and against his consent. In this respect it differs from a pardon to the validity of which acceptance is essential." Therefore the fact that one of the "copies" or certificates of commutation purported to contain the petitioner's acceptance where the others did not in no respect makes the other "copies' less valid as evidence or certification of the commutation; the purported acceptance is of no significance as to the validity or consequence of any certificate or attestation of commutation.

With reference to a commutation, the Minnesota Statutes provide:

> "The Board of Pardons may grant an absolute or conditional pardon, but every pardon shall state the terms and conditions on which it was granted. * * * Every pardon or commutation of sentence shall be in writing and shall have no force or effect unless granted by a unanimous vote of the Board duly convened."
>
> *Minnesota Statutes* 1941, Sec. 638.02.
>
> "The board of pardons shall keep a record of every petition received, and of every pardon, reprieve, or commutation of sentence granted or refused, and

> the reasons assigned therefor, and shall have a seal with which every pardon, reprieve or commutation of sentence shall be attested. * * * The board may appoint a secretary * * * who shall have charge of and keep its records. * * *"
>
> *Minnesota Statutes* 1941, Sec. 638.07.

The minute record of the Board of Pardons (R. 12), the book record or book copy (R. 48, 49, 50, 51), and the notification to the petitioner specified that the sentence of Earl Guy was *commuted to expire forthwith.* It did not contain any reservation of any right of the Board of Pardons to revoke the commutation, nor any conditions. The "Rubber Stamp" paragraph is not present in any document other than a copy of the commutation filed in the Office of the Governor. The certificate of commutation recorded in the office of the secretary of the Board of Pardons likewise contains no reservation of authority nor any conditions.

Pursuant to the hereinafter quoted sections of the Minnesota Statutes, 1941, in effect at the time, the respondent did certify that the sentence imposed upon the petitioner was terminated, to wit: "That the said Earl Guy was on the 22nd day of December 1936, released from further imprisonment in the Minnesota State Prison for the reason that the Board of Pardons on December 14, 1936 commuted said sentence to expire forthwith." (R. 14).

In the Governor's order of restoration of civil rights (R. 15) the following words appear: "* * * for the reason that the Board of Pardons commuted said sentence to expire forthwith."

In neither the Certification nor the Restoration is any mention made of any conditions or reservation of authority being attached to the commutation in any manner.

In the following sections of the Minnesota Statutes, above referred to, the certification of the termination of a prisoner's sentence is mandatory, while the restoration is discretionary:

610.41 Restoration to Civil Rights.

"All persons residing or having their domicile in this state, who have been or may hereafter be convicted of a felony and sentenced by a court of this state to the state reformatory or the state prison for such offense, may be restored by the Governor, in his discretion, to civil rights, upon certification to him by the judge, officer, or board having jurisdiction, custody, or supervision of such person at the time such jurisdiction, custody of supervision is terminated of the matters specified in Section 610.42."

610.42 Certification by Proper Officers.

"Every such judge, officer, or board shall, upon the termination of such jurisdiction, custody, or supervision, certify to the Governor, as follows: The Court wherein the conviction was had; the offense of which such person was convicted; the indefinite suspension of the sentence, or the release, discharge or other final disposition of the person at the termination of the sentence, and the nature and character of his conduct while under such jurisdiction, custody or supervision.

"It shall also be the duty of any such judge, officer, or board to certify such matters with reference to any such person whose sentence has heretofore been terminated and who has not heretofore been restored to civil rights, when such person shall make application therefor in writing, and the governor may, in like manner, in his discretion, restore such person to civil rights."

The evidence cumulatively indicates that the commutation in question was unconditional; that the sentence of the petitioner was terminated; and that the petitioner

was restored to his civil rights in a lawful manner. Not merely is the State of Minnesota estopped from depriving the petitioner of his civil rights without due process of law, but the Board of Pardons by such commutation and restoration of civil rights has lost all jurisdiction over the person of the petitioner.

II.

The Court below erred in holding that the petitioner collaterally attacked the "original record" of commutation; it erred in construing a copy of the commutation as the "original record".

Confusion arises as to what is the "original record" of commutation. In 45 *Am. Juris,* Records & Recording Laws § 2, page 420, "It is said that a public record is one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done."

The Minnesota Statutes make special reference to the public record which the Pardon Board is required to keep:

> "The board of pardons shall keep a record of every petition received, and of every pardon, reprieve, or commutation of sentence granted or refused, and the reasons assigned therefor, and shall have a seal with which every pardon, reprieve or commutation of sentence shall be attested. * * * The board may appoint a secretary * * * who shall have charge of and keep its records. * * *"
>
> Minnesota Statutes 1941, Sec. 638.07.

Since the statute requires the board to keep a record of its action on every commutation of sentence granted or reviewed, and the reasons assigned therefor, records of

its minutes were kept and a book copy or book record maintained. This served as a memorial and as a mandatory evidence of what was done by the board in a meeting duly convened. It is submitted, therefore, that the records of the *minutes* constitute the statutory record—the original record—of the action of the Board of Pardons; and that the "certificate" of commutation is merely an attestation of such action.

The *records of the minutes* of the Board of Pardons show that the sentence of Earl Guy was *"commuted to expire forthwith."* It attached no conditions thereto as it did in some other cases considered (R. 11-13).

The Court below held that the "original" commutation was on file in the Governor's Office. But by seeking to substantiate the copy of the commutation on file in the Governor's Office, the respondent is collaterally attacking the minute record which is in fact and in law the original record. The testimony of the secretary of the Board of Pardons clearly shows that the preparation of this document was a mere ministerial act that he performed as secretary. (Exhibit "F" 94-102).

It is submitted to this Court that the certificate of commutation in question on file in the Governor's Office is merely an *attestation* of such action of the Board of Pardons granting the commutation pursuant to the statutory provision above quoted.

III.

The Court below erred in affirming the denial of the Petition for a Writ of Habeas Corpus as being within the doctrine of res judicata.

At Common Law and in the absence of a statute providing otherwise, a decision under a Writ of Habeas Corpus, refusing to discharge a prisoner is not a bar to or *res judicata* on the subsequent issuing of another writ, based on the same state of facts, and to a hearing or a discharge thereon.

State ex rel. Lambke v. *Bechdel,* 37 Minn. 360 31 N.W. 334.

In re Snell, 31 Minn. 110, 16 N.W. 692.

The Federal courts as well as the State courts have generally followed this rule.

Waley v. *Johnston,* 316 U.S. 101.

Hawk v. *Olson,* 326 U.S. 271.

Salinger v. *Loisel,* 265 U. S. 224, 68 L. Ed. 989, 44 S. Ct. 519.

U. S. ex rel. Bruno v. *Reimer,* 103 Fed. (2d) 341.

Where the statute in question is in derogation of the Common Law it must be strictly construed.

Res Judicata presumes a judgment rendered on the *merits* and is conclusive of the questions and facts *in issue* in all other actions in the same tribunal (or other tribunal of concurrent jurisdiction). 30 *Am. Jur.* p. 908 *et seq.* § 161 *et seq.*

The Court below suggested that the case at bar was once again in the Minnesota Supreme Court on the same set of material facts and it stated that (*Guy* v. *Utecht,* .... Minn. ...., 38 N. W. 2d 59, 60):

> "the basis of the common-law doctrine permitting a renewal of the petition for habeas corpus on the same set of facts no longer exists, and that the doctrine of *res judicata* applies."

The Court cited *State ex rel. Du Fault* v. *Utecht,* 220 Minn. 431, 19 N.W. 2d 706, 161 A.L.R. 1316 as authority for this proposition. The *Du Fault* case in turn cited Minn. St. 1941, § 589.29 which provides for appeals in habeas corpus proceedings as follows:

> "Any party aggrieved by the final order in proceedings upon a writ of habeas corpus may appeal therefrom to the supreme court in the same manner as other appeals are taken from the district court, except that no bond shall be required of the appellant."

The statute also provides § 589.30 " • • • the appeal shall be tried and judgment rendered in the same manner as if the writ had originally issued out of the supreme court • • •"

The petitioner contends that the *Du Fault* case is clearly distinguishable from the case at bar on two grounds. In the former matter the relator filed a petition for a writ of habeas corpus but did not appeal same upon its dismissal. He then filed a second petition on the same grounds.

Construing this statutory provision strictly it is urged that the proceedings of a trial *de novo* are in aid of the exercise of the *appellate* jurisdiction of the Supreme Court, and not in aid of its *original* jurisdiction. For that reason the *Du Fault* doctrine does not seem applicable, where, as in the instant case, an appeal was taken on the first petition and a trial *de novo* had in the Supreme Court.

Further, the doctrine of *res judicata* does not apply in the instant case because the petition for a Writ of Habeas Corpus renewed before the District Court of Washington County did not present the same facts nor raise the same issues as those presented and raised by the first petition before that Court.

The evidence of the minute record and copy book was not presented to either the trial court or to the Supreme Court upon the hearing of the first petition; nor was the validity of the restoration of civil rights and its consequence adjudicated. Further, the questions of a collateral attack on the records were not raised upon the initial proceeding on the first petition. The testimony of Louise Jefferson was not previously had, nor was the notification introduced, as this was newly discovered evidence.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Court should grant the Writ of Certiorari to the Petitioner.

HARRY O. ROSENBERG,
Attorney for Petitioner.

DAVID R. LANDAU,
ARTHUR LESUEUR,
Of Counsel.

APPENDIX.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No.

EARL GUY,
Petitioner,

vs.

L. F. UTECHT, Warden of State Prison, Stillwater, Minnesota,
Respondent.

Motion to Dispense With Printing of the Record Upon the Proceedings on the Petition for Writ of Certiorari Herein.

Upon the annexed affidavit of David R. Landau, one of his attorneys, petitioner moves for an order of this court to dispense with the printing of the transcript of record and exhibits for use on the proceedings on the petition for writ of certiorari herein and that a certified copy of the typewritten record be considered on the said proceedings in lieu of printed copy of the said record.

DAVID R. LANDAU.

Dated—November 4, 1949.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No.

EARL GUY,

Petitioner,

vs.

L. F. UTECHT, Warden of State Prison, Stillwater, Minnesota,

Respondent.

State of Illinois,
County of Cook—ss:

David R. Landau, being duly sworn, deposes and says:

I am one of the attorneys for the petitioner herein. The facts concerning this cause are set forth in the petition printed herewith.

I have consulted with the petitioner and he has informed me that it would be an extreme hardship to pay the cost of printing the record for use on these proceedings for petition for writ of certiorari. He has assured

me, however, that if certiorari is granted by this honorable court he will be able to borrow the necessary funds to print the record for the use of this court upon subsequent argument.

I verily believe that there are questions of law involved herein which merit the consideration of this honorable court upon petition for writ of certiorari and that upon such consideration that this honorable court should grant certiorari. Unless the court should grant the instant motion to dispense with the printing of the record for these proceedings, the petitioner will be foreclosed from presenting to this court grave questions of law, which, if left unsettled, would deprive him of not only his constitutional rights but also of his liberty.

Wherefore, your deponent prays that this honorable court issue its order to dispense with the printing of the transcript of record and exhibits, for use on these proceedings for petition for writ of certiorari, and to consider the instant petition upon the certified copy of the typewritten transcript of record used by the Minnesota Supreme Court.

David R. Landau

Sworn to before me this 4th day of November, 1949.

John P. Lizak,
(Seal) Notary Public of Cook County

My commission expires Sept. 21, 1953.

State of Illinois,
Cook County—ss.

I, Michael J. Flynn, County Clerk of the County of Cook, Do Hereby Certify that I am the lawful custodian of the official records of Notaries Public of said County, and as such officer am duly authorized to issue certificates of magistracy, that John P. Lizak whose name is subscribed to the annexed Jurat, was at the time of signing the same, a Notary Public in Cook County, duly commissioned, sworn and acting as such, and authorized to administer oaths and to take acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments, in said State of Illinois, all of which appears from the records and files in my office; that I am well acquainted with the handwriting of said Notary, and verily believe that the signature to the said Jurat is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the County of Cook at my office in the City of Chicago, in the said County, this 4th day of Nov., 1949.

Michael J. Flynn,
County Clerk.

(Seal)

FILE COPY

Supreme Court, U. S.
FILED
NOV 28 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. 446

OCTOBER TERM, 1949

HABEAS CORPUS

EARL GUY,

Petitioner,

vs.

L. F. UTECHT, Warden of State Prison, Stillwater, Minnesota,

Respondent.

BRIEF IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI

J. A. A. BURNQUIST
Attorney General
RALPH A. STONE
Assistant Attorney General
102 State Capitol
St. Paul 1, Minnesota
Attorneys for Respondent

HOWARD T. VAN LEAR
Assistant County Attorney
Minneapolis 15, Minnesota
Of Counsel

SUBJECT INDEX

		Page
Opinions of court below		1
Statement of the case		2
Argument		
I.	Earl Guy's commutation was conditional upon his leading a law-abiding life	8
II.	All points raised by this petition for a writ of habeas corpus were disposed of in the case of Guy v. Utecht, 216 Minn. 255	9
III.	There is no new evidence presented to the State Supreme Court upon this second application for a writ of habeas corpus	13
IV.	Motion to dispense with the printing of the record	16

AUTHORITIES CITED

Table of cases cited:

Guy v. Utecht, 229 Minn. ——, 38 N. W. 2d 59, (Decided June 10, 1949) 1, 14

Guy v. Utecht, 216 Minn. 255, 12 N. W. 2d 753 ..1, 2, 7, 9, 14

Guy v. Utecht, 54 F. Supp. 287 ..... 1, 15

Guy v. Utecht, 144 F. 2d 913 ..... 1, 11

State ex rel. DuFault v. Utecht, 220 Minn. 431, 19 N. W. 2d 706 11

Textbooks cited:

28 U.S.C.A. § 461, p. 162 12

8 F.R.D. 171 12

Statutes cited:

Minnesota Statutes 1941, Sec. 638.07 5

Supreme Court of the United States

No. 446

OCTOBER TERM, 1949

HABEAS CORPUS

EARL GUY,

Petitioner,

vs.

L. F. UTECHT, Warden of State Prison, Stillwater, Minnesota,

Respondent.

BRIEF IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI

OPINIONS OF THE COURT BELOW

Guy v. Utecht, 229 Minn. ——, 38 N. W. 2d 59, (Decided June 10, 1949).

Guy v. Utecht, 216 Minn. 255, 12 N. W. 2d 753.

Guy v. Utecht, 54 F. Supp. 287.

Guy v. Utecht, 144 F. 2d 913.

STATEMENT OF THE CASE

There is no printed record. If there is a certified copy of the typewritten record on file, it has not been served upon the warden or his attorneys. However, the petition for a writ of habeas corpus filed herein in January, 1949, contains the following:

> "The petitioner hereby incorporates by reference the entire record in said proceedings in the Supreme Court of Minnesota #33642 (216 Minn. 255) as Exhibit 'F'."

Therefore the opinion of the Supreme Court of Minnesota, recorded in *Guy v. Utecht,* 216 Minn. 255, 12 N. W. 2d 753, is before this court.

From that opinion the following facts appear and are established:

> "On December 12, 1929, Earl Guy, hereinafter called petitioner, was convicted of the crime of bank robbery and sentenced to life imprisonment. The board of pardons commuted his sentence on December 14, 1936, and he was forthwith released. On November 27, 1939, he was charged with the crime of burglary in the third degree, during the perpetration of which he assaulted an officer. In February 1940, he was charged with the crime of first-degree robbery. Subsequent to the filing of these charges, the board of pardons, on February 16, 1940, without notice and hearing, revoked and annulled his commutation of sentence. He was thereupon returned to prison to serve the remainder of his sentence.
>
> "Petitioner applied to the district court for a writ of habeas corpus, which was issued on December 22, 1942. The application for the writ alleged among other things that the board of pardons was without jurisdiction to

revoke or cancel its act of commutation of sentence, since such commutation was absolute, unconditional, a final termination thereof, and in the following language:

"'AND WHEREAS, the Board of Pardons has duly heard and considered said application and determined that it ought to be granted, when and if he secures employment, and upon condition that he keep steadily employed thereafter, lead a law abiding life, and for two years report to and counsel with his attorney, Arthur LeSueur, at least once a month, and that said LeSueur report to the Secretary of this board quarterly as to said Guy's conduct, employment and progress.

"'NOW THEREFORE, the Board of Pardons of the State of Minnesota, for good and sufficient reasons, as well as those appearing in said application and by virtue of the authority vested in said Board by the Constitution and Laws of the State of Minnesota does hereby "COMMUTE the said sentence now in force against the said Earl Guy to expire forthwith."

"'Supporting the application was a certified copy of the commutation as found in the records of the pardon board and the order of that board revoking such commutation. In the return to the writ, respondent contended that the commutation of sentence was conditional upon petitioner's leading a law-abiding life; that such condition had been violated; and that the action of the pardon board in revoking the commutation was proper. The trial court heard the matter and held the commutation to be unconditional and an absolute termination of sentence, and ordered petitioner released from custody. Respondent then filed a motion to vacate the order discharging petitioner, and in support thereof offered an affidavit wherein it was stated, among other things, that petitioner's exhibit attached to his

application for the writ of habeas corpus, and purporting to be a true and correct copy of the commutation of sentence executed by the pardon board, was in fact incorrect and false in that the following language appeared in the original commutation of sentence on file in the governor's office and did not appear in petitioner's copy thereof:

"'This commutation is granted and accepted upon the express understanding that this board reserves the right to determine whether any condition hereof has been violated and if violation be found to revoke this commutation and to cause the said prisoner to be returned to your institution to serve the remainder of his said sentence.'

"It was further stated that the original commutation of sentence was expressly accepted with such condition imposed upon petitioner, who subscribed his name thereto; that such acceptance and signature does not appear on petitioner's exhibit. Pursuant to respondent's motion and affidavit, an order was made setting aside and vacating the former order releasing petitioner. Respondent was permitted to file an amended return to the writ. Thereafter a second hearing was had upon the application and amended return and evidence adduced relating to petitioner's alleged violation of the conditions attached to the commutation of sentence. The court made findings of fact, conclusions of law, and order for judgment adjudging that petitioner's commutation of sentence was conditional; that the conditions thereof had been violated in that he had failed to lead a law-abiding life; and ordering that such commutation of sentence be revoked, the writ discharged, and petitioner remanded to the custody of respondent to serve the remainder of his sentence. From this order petitioner appeals. Thereafter, on August 25, 1943, an order of refer-

> ence was made by this court appointing the same trial judge as referee to take further evidence. This was done. Since this is an appeal involving a writ of habeas corpus, the matter is before this court de novo upon the evidence taken at the hearings before the district judge and referee. Minn. St. 1941, § 589.30 (Mason St. 1927, § 9768); State ex rel. Vik v. Sivertson, 194 Minn. 380, 260 N. W. 522."

The original commutation which was granted to the petitioner and which is on file in the office of the governor, contains on the face thereof the language above quoted, beginning with the phrase "This commutation is granted and accepted * * *".

The petitioner incorrectly quotes this reservation clause in his petition herein on page 4. As quoted by petitioner the clause reads "if violation can be found". The word *"can"* is erroneously inserted. "Can" is not in the reservation clause as stamped upon the commutation.

The petition herein is incorrect in another respect. It reads on page 14, "The 'Rubber Stamp' paragraph is not present in any document other than a *copy* of the commutation filed in the Office of the Governor."

The commutation on file in the governor's office is the only one which bears the signature of the chief justice, the governor and the attorney general, and is the original.

The petitioner quotes a portion of Minnesota Statutes 1941, Sec. 638.07, but omits the pertinent part thereof which is found in the last sentence of that section, and which reads as follows:

> "The records and all the files shall be kept and preserved *in the office of the governor,* and shall be kept open to public inspection at all reasonable times."

In determining that the original commutation on file in the governor's office was the original and not a copy, the Supreme Court of Minnesota relied upon the following facts:

That the commutation in the governor's office is the only one bearing the original signatures of the members of the pardon board, to-wit: the governor, chief justice and attorney general.

The statute requires that it be filed in the governor's office.

After the commutation had been executed by the members of the board of pardons, it was forwarded to the warden, who made three copies of that document, one for his records, one for the clerk of the district court where the conviction was obtained, and one for the prisoner.

At the trial of the first habeas corpus case, the copy made for the clerk of the district court was produced, and it bears thereon the reservation clause; the copy made for the warden's file was also produced and it also bears the reservation clause. The copy given to Earl Guy himself was not produced.

The reservation clause must have been upon the document when copied by the warden, otherwise the copies would not have contained it.

Furthermore, the Honorable Harry H. Peterson, one of the judges of the Supreme Court of Minnesota, and who was at the time the attorney general and member of the pardon board who signed this commutation, testified that the reservation clause sustaining the right to revoke the commutation was stamped upon the commutation when it was signed by him (see printed record of testimony taken before the referee in the State Supreme Court in the Earl Guy case on page 57).

The petitioner failed to live up to the conditions under which his sentence was commuted. He did not lead a law-abiding life.

Quoting again from the record in 216 Minn., the following facts appear on page 268:

> "On November 27, 1939, the River Lake Motors Company was burglarized by petitioner and another. While attempting to escape he was shot. That evening police officers questioned him at home. He was in bed and in great pain. His garments disclosed the bullet hole. He was removed to the hospital, and the X-rays taken at that time revealed the bullet lodged in petitioner's pelvis. Later X-rays taken by the prison authorities reflected the same condition.
>
> "In February 1940 petitioner was accused of taking part in the Hans Rosacker robbery. The evidence is overwhelming that he drove the holdup automobile and shared in the proceeds of the crime. With his associates in crime he planned to burglarize two other business establishments, but these plans failed to materialize.
>
> "Petitioner alleges in his application for the writ that he has complied with the conditions of his commutation of sentence, but upon the hearing he made no offer to refute the charges against him. He had ample opportunity to do so."

The sentence of the petitioner was commuted upon condition that he lead a law-abiding life. While he was at liberty he committed at least the two robberies referred to in the last quotation above and planned others.

Nowhere in his petition for a writ of habeas corpus herein nor in his petition for a writ of certiorari herein, nor in his brief, does the petitioner allege that he led a law-abiding life during the time that he was at liberty from the prison.

The warden will discuss the petitioner's arguments herein in the same order in which they are set forth in the petitioner's brief.

ARGUMENT

I.

The Commutation Which was Granted to Earl Guy in 1936 was a Conditional One, Reserving the Right to Revoke it in case the Petitioner Failed to Lead a Law-Abiding Life.

The reasons why the original commutation which is on file in the governor's office is the original and not a copy are well set forth in the opinion of the Supreme Court of Minnesota in the Earl Guy case, supra, and in the above quotations therefrom.

The original commutation on file in the governor's office is signed with the original signatures of the governor, chief justice and the attorney general, who constitute the board of pardons.

One of the present justices of the Minnesota Supreme Court who was then attorney general, testified that the clause reserving the right to revoke the commutation was on the original when he signed it. After being signed, the original was sent to the warden at Stillwater, who made three copies, one for his files, one for the clerk of the court in which the conviction was had, and one for the prisoner. The copies made for the clerk of the district court where the conviction was had and for the warden's file were produced at the trial

in the District Court of Minnesota, and they carry thereon the reservation of the right to revoke. That reservation could not have been copied thereon unless it was on the original from which the warden copied it.

The original commutation on file in the governor's office bears the signature of Earl Guy under the word "Accepted".

No constitutional question is presented in this argument. The question of what constitutes the original record of the board of pardons is a question for determination by the state court, and its determination is final.

The foregoing constitutes a complete answer to points I and II of petitioner's brief.

II.

All the Points Raised by the Last Petition for a Writ of Habeas Corpus (Denied by the District Court of Minnesota in February, 1949, and Affirmed by the Supreme Court of Minnesota June 10, 1949) were Disposed of in the case of Guy v. Utecht, 216 Minn. 255. No New Points were Raised by the said Last Petition for a Writ of Habeas Corpus. The Doctrine of Res Judicata Applies.

The Supreme Court of Minnesota in its last opinion denying the issuance of a second writ of habeas corpus, which decision was handed down June 10, 1949, points out: "We considered the questions raised in this appeal in *Guy v. Utecht,* 216 Minn. 255, 12 N. W. 2d 753." The court then points out that there is no new point raised by the second petition for a writ. The court says:

"The only new documentary evidence presented to the court at the hearing on the order to show cause was a copy of a notice sent by the clerk of the board of pardons notifying appellant that his sentence had been commuted. Petitioner's Exhibit A. It was a form card, and said nothing about any conditions attached to the commutation. Apparently such card was sent to every prisoner whose sentence was commuted. It was claimed that appellant was unable to produce it in the first action because it had been mislaid and just recently found. The card adds nothing to appellant's rights. By this card, he is again attempting to attack collaterally the original commutation on file in the governor's office, which contains the conditions on which the commutation was granted, and the clause reserving to the pardon board the right to determine whether a condition had been broken, both set out in full in Guy v. Utecht, supra. We held in the prior action that the record of a pardon kept in the governor's office pursuant to M. S. A. § 638.07 is an original record and cannot be collaterally attacked.

"At the hearing on the order to show cause, appellant called one Louise Jefferson, who in 1936, when the commutation was granted, was a stenographer in the office of the board of pardons. Appellant contends that her testimony substantiates his claim that the rubber stamp which conditioned the commutation was affixed at the state prison and not in the office of the board of pardons. Her testimony does not bear out appellant's contention. A reading of it clearly so demonstrates."

The Supreme Court of Minnesota in its last opinion then holds that the doctrine of res judicata is applicable to the facts in this case. The court says:

> "* * * The matter is here again on the same set of material facts. In State ex rel. Du Fault v. Utecht, 220 Minn. 431, 19 N. W. 2d 706, 161 A. L. R. 1316, we held that the basis of the common-law doctrine permitting a renewal of the petition for habeas corpus on the same set of facts no longer exists, and that the doctrine of res judicata applies."

In the case of *State ex rel. Du Fault v. Utecht,* 220 Minn. 431, 446, 19 N. W. 2d 706, the question of the application of the doctrine of res judicata is given extended consideration. The court concluded:

> "As has been stated, in this state a special appeal statute covering writs of habeas corpus has been enacted. This statute, in addition to providing for an appeal, also provides for a trial de novo of such appeals in this court. In view of this situation, we are of the opinion that the basis of the common-law doctrine permitting a renewal of the petition on the same facts no longer exists, and that the doctrine of res judicata applies.

The question of whether the doctrine of res judicata applies in habeas corpus case in a state court is a question of state interest only. It does not raise any constitutional question under the federal constitution.

> "* * * The highest court of a state is the final arbiter of what the state law is, and, when that court has spoken, its decision must be accepted by the federal courts as defining the law of the state." (Citing cases) *Guy v. Utecht,* 144 F. 2d 913, 915.

Although the federal courts have usually held that the doctrine does not apply in the federal courts, yet it is now

the law that the federal court may base its refusal to discharge on a prior refusal. To do so is not to deprive the petitioner of any constitutional right.

The following is quoted from 28 U. S. C. A. § 461, p. 162:

> "* * * But in the exercise of its sound, judicial discretion 'to dispose of the party as law and justice may require,' a federal court may base its refusal to discharge on a prior refusal; and, as a safeguard against abuse of the writ, the applicant in any case may be required to show whether he has made a prior application and, if so, what was done on it. Salinger v. Loisel (La. 1924) 265 U. S. 224, 44 S. Ct. 519, 68 L. Ed. 989, reversing (C. C. A. 1923) 295 F. 498."

An illuminating article on the subject "Limiting the abuse of Habeas Corpus" written by the Hon. John J. Parker, is found in 8 F. R. D. 171. It is there pointed out that prior denials of the writ may be taken into consideration in denying an application for a writ of habeas corpus, and attention is directed to Section 2244 of the Revised Code which "makes it discretionary with the judge whether to entertain the petition of a prisoner who has been convicted of crime, where it appears that the legality of his detention has been determined on a prior application for habeas corpus and the judge is satisfied that the ends of justice will not be served by further inquiry."

So that it now may be said that in Minnesota the doctrine of res judicata applies, and that the same doctrine in a modified form applies in the federal courts which may base a refusal to issue the writ upon a prior refusal.

III.

There is No New Evidence Presented to the State District Court or the State Supreme Court Upon this Second Application for a Writ of Habeas Corpus.

In concluding Subdivision III of his brief the petitioner says:

> "The evidence of the minute record and copy book was not presented to either the trial court or to the Supreme Court upon the hearing of the first petition; * * *."

This is contrary to the fact. The warden refers to the printed testimony of Louise Jefferson in the evidence taken before the referee in the Supreme Court in the first case. It there appears that the copy book was presented in the Supreme Court, and that the reservation of the right to revoke does not appear upon the copy book. The stamp was not placed on the copy in the book.

The minute record was also presented to the Supreme Court as shown by the evidence taken before the referee and printed on page 18 of the transcript of that testimony Attention is there called to "Petitioner's proposed Exhibit B, consisting of two typewritten sheets". This is the same minute record to which the petitioner refers in his present petition and brief.

In concluding Subdivision III of its brief, counsel says "nor was the validity of the restoration of civil rights and its consequence adjudicated".

In Minnesota the pardoning power is vested in a board consisting of the governor, the chief justice and the attorney general. Only this board has the power to grant commuta-

tions. No matter if the governor did restore the convict to his civil rights, it did not operate as a commutation or a pardon, as the governor has no pardoning power.

Further, in the concluding paragraph of his brief the petitioner says "the questions of a collateral attack on the records were not raised upon the initial proceeding on the first petition".

This question was raised and decided by the Supreme Court in that case. See *Guy v. Utecht,* 216 Minn. 255, 262, where the court says:

> "* * * He urges that respondent, in producing and relying upon the record of commutation as found on file in the governor's office, is in effect making a collateral attack upon the commutation. The fallacy of petitioner's position is his erroneous assumption as to what constitutes the original record. Holding as we do, that the record in the governor's office is the original, it follows that petitioner's attempt now to question it constitutes a collateral attack. A public record required to be kept is not open to collateral attack. The verity of such a record is conclusive. 45 Am. Jur., Records and Recording Laws, p. 423, § 9."

Petitioner concludes the body of his brief with this language:

> "* * * The testimony of Louise Jefferson was not previously had, nor was the notification introduced, as this was newly discovered evidence."

This claim is answered by the quotation from the opinion of the State Supreme Court in 38 N. W. 2d p. 59, and the above quotation from page 60 thereof.

In concluding his argument in opposition to the granting of the writ of certiorari, the warden wishes to reiterate the following:

Petitioner did not in his petition for a writ of habeas corpus filed in January, 1949, allege that he had led a law-abiding life during the period that he was at liberty under the conditional commutation. He does not make any such allegation in his petition for a writ of certiorari herein. He does not make any such allegation in his brief in support of his petition herein.

The Federal District Court of Minnesota noted this avoidance of the merits of the controversy in its opinion denying the issuance of a writ of habeas corpus to the petitioner in the following language:

> "* * * The Supreme Court of Minnesota on a hearing de novo has found that the petitioner's conditional commutation was violated and that this fact appears conclusively. Not only was the showing in this regard uncontroverted, but even in this petition which is now presented to this court, there is an utter absence of any allegation or contention that if a hearing was granted by the Board of Pardons or by this court, he could demonstrate that he had led a law-abiding life since his release in 1936. He does not attempt to deny, in the petition before this court, the burglary in 1939 or the robbery in February, 1940." *Guy v. Utecht,* 54 F. Supp. 287, 289.

On November 27, 1939, Earl Guy, while at liberty under his conditional commutation, was interrupted in his attempt to burglarize the River Lake Motors in Minneapolis. He was then shot in the pelvis but escaped. On the evening of that day the police officers located Earl Guy at his father's house, 4317-12th Avenue South, in Minneapolis. He was in bed suffering from a bullet wound in the pelvis and sent to the hospital. Until Earl Guy shall explain how and when he

got that bullet wound (he still carries the bullet in his body), his application for a writ of habeas corpus deserves but little consideration. (See printed transcript of the testimony taken in the first Earl Guy case and on file in the Supreme Court of Minnesota, and found at pages 111, 114-145, 249-296.)

IV.

Motion to Dispense with the Printing of the Record

The petitioner moves that a certified copy of the typewritten record be considered in said proceedings in lieu of the printed copy of the record. No typewritten record has been served upon the warden. Counsel for respondent do not know what is in the certified copy of the typewritten record if one is on file in this court.

Such a copy should contain not only a copy of the proceedings on the present petition, but a full copy of the testimony taken in the State lower court and in the State Supreme Court upon the first hearing of this case.

The petitioner attempts to incorporate by reference the entire record in the proceedings in the first Earl Guy case. Therefore, unless the typewritten record on file in this court contains the evidence upon which the Supreme Court of Minnesota acted in the first Earl Guy case, the record is incomplete.

CONCLUSION

WHEREFORE, respondent respectfully submits that a writ of certiorari should be denied.

J. A. A. BURNQUIST
Attorney General
RALPH A. STONE
Assistant Attorney General
102 State Capitol
St. Paul 1, Minnesota
Attorneys for Respondent

HOWARD T. VAN LEAR
Assistant County Attorney
Minneapolis 15, Minnesota
Of Counsel